

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRTIETH REGION

Clintonville, WI

**FIVE STAR QUALITY CARE, INC. D/B/A PINE MANOR  
HEALTH CARE CENTER<sup>1</sup>**

**Employer**

**Case 30-RC-6726**

**and**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND  
SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-  
CLC<sup>2</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

**I. INTRODUCTION<sup>3</sup>**

On May 8, 2008, the Petitioner filed a petition to represent a unit of employees working for the Employer at one of its facilities in Clintonville, Wisconsin. The sole issue is whether the licensed practical nurses who are included in the petitioned-for unit are supervisors within the

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<sup>1</sup>The name of the Employer appears as amended at hearing.

<sup>2</sup>The name of the Petitioner appears as amended at hearing.

<sup>3</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds: (1) The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; (2) During the past calendar year, in conducting its business operations, the Employer had gross revenue exceeding \$100,000, and purchased and received products, goods, and materials valued in excess of \$50,000 from points located directly outside the State of Wisconsin; (3) The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein; (4) The Petitioner is a "labor organization" seeking to represent certain employees of the Employer for the purposes of collective bargaining; (5) A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The parties stipulated that any unit found to be appropriate should include "all full-time and regular part-time certified nursing assistants, housekeeping employees, laundry workers, recreation assistants, certified medication aides, dietary aides, and chef/cooks working at the Employer's 1625 East Main Street facility in Clintonville, Wisconsin, and exclude subcontracted employees, professional employees, managerial employees, confidential employees, office clerical employees, casual employees, guards and supervisors as defined in the Act." The parties further stipulated that whether an employee is a "casual" employee will be determined by whether or not the employee has worked an average of four or more hours a week in the quarter preceding the eligibility date.

meaning of Section 2(11) of the Act. Based upon my review of the record, and for the reasons set forth below, I conclude the Employer has met its burden of establishing that these licensed practical nurses possess the authority, in the interest of the Employer, to both reward and discipline, or to effectively recommend such action, using independent judgment, in more than a merely routine or clerical nature. As such, the licensed practical nurses are excluded as Section 2(11) supervisors.

## **II. FACTUAL SUMMARY**

The Employer operates a long-term care facility located in Clintonville, Wisconsin. The facility is licensed to maintain 95 beds, but currently houses 70 residents. The residential areas are all on one floor in five separate wings, which are designated A, B, C, D and E. E wing is a secured Alzheimer's unit. The C wing currently is not being used and is vacant.

The parties stipulated the management team includes the Nursing Home Administrator, the Director of Nursing, the Minimum Dataset Coordinator, the Assistant Director of Nursing and Qualified Mental Retardation Professional, the Human Resource Manager, the Director of Housekeeping, the Certified Dietary Manager, the Director of Recreation, the Laundry Supervisor, the Maintenance Director, the Director of Social Services, the Business Office Manager, and approximately four Registered Nurses (RNs).<sup>4</sup> Additionally, the Employer employs approximately nine Licensed Practical Nurses (LPNs), 44 Certified Nursing Assistants (CNAs), three Certified Medication Aides (CMAs), five Recreation Assistants, seven Dietary Aides, three Housekeepers, three Laundry Workers, and three Chef/Cooks.

The facility is staffed 24 hours a day, 365 days a year. There are three shifts for each of the operating wings. The employees have staggering shifts. The day shift typically is from 6:00

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<sup>4</sup> The parties stipulated that the Registered Nurses are supervisors within the meaning of Section 2(11) of the Act and possess and exercise, at a minimum, the authority to assign and direct work.

a.m. to 2:00 p.m., the P.M. shift is typically from 2:00 p.m. to 10:00 p.m., and the night shift (NOC) is typically from 10:00 p.m. to 6:00 a.m. On first shift, there are one RN or LPN and three CNAs assigned to A wing; one RN or LPN and three CNAs assigned to B wing, and one RN or LPN and three CNAs assigned to D and E wings. There also is one CMA assigned to the shift. On the P.M. shift, the Employer either schedules three RNs or LPNs and one CMA or two RNs or LPNs and two CMAs. When there are three RNs or LPNs, there will be a nurse for A wing, a nurse for B wing, and a nurse for D and E wings. When there are two RNs or LPNs, there will be one nurse for A and B wings and one nurse for D and E wings. There also will be two CNAs assigned to each wing, as well as two peak-hour CNAs who work 4:30 p.m. to 8:30 p.m. to assist with dinner, bedtime, and p.m. care. On the NOC shift, the Employer has one CNA for each wing, and one RN and LPN for A and B wings and one RN and LPN for D and E wings. The head administrator and other managerial employees typically work from 8:00 a.m. to 5:00 p.m. from Monday through Friday. In their absence, the RNs and LPNs are the highest ranking employees at the facility.<sup>5</sup>

The LPNs generally begin their shifts by receiving report on the status of the residents in their wing. The LPNs will then work with the CNAs to make sure residents' vital signs are checked and, if necessary, entered into the computer system. The CNAs also are responsible for, among other tasks, bathing, toileting, dressing, and other day-to-day care of the residents. The LPNs then will consult the treatment book, which contains the treatment plans for each of the

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<sup>5</sup> The LPNs and RNs both report to the Director of Nursing, or in her absence, the Assistant Director of Nursing. There are no charge nurses at this facility. There is one RN who acts as a "unit manager" for the E wing. After 5:00 p.m., assuming there is not an RN on duty at the facility, there is one off-site RN who is on-call for the entire facility. There are differences between the LPNs and the RNs concerning their professional skills and responsibilities (e.g., RNs must be present or involved when IVs are being administered or when certain patient assessments or reporting needs to be completed), but for the most part are treated by the Employer as "interchangeable." The Union disputes this contention and argues that only the RNs possess supervisory authority.

residents, perform or make sure all necessary treatments are performed, and verify that there have been no changes or new orders affecting treatment plans. The LPNs also are responsible for communicating with doctors, CNAs, other employees, the residents, and the residents' families concerning resident care, and also are responsible for charting and completing other reporting paperwork.

### III. ANALYSIS

The sole issue is whether the LPNs are “supervisors” within the meaning of Section 2(11) of the Act. Section 2(11) of the Act defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The definition of “supervisor” is set forth in the disjunctive; thus, possession of any one of these listed indicia of authority is sufficient to find the individual at issue a supervisor, so long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment. See e.g., *Providence Hospital*, 320 NLRB 717, 725 (1996), *affd.* sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997). The burden of proving supervisory status rests on the party asserting that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001); see also *Oakwood Healthcare*, 348 NLRB No. 37, slip op. at 9 (2006).

Regardless of which one (or more) of the twelve indicia the purported supervisor possesses, he or she still must exercise independent judgment in taking those actions, and the decisions cannot be merely routine or clerical. In *NLRB v. Kentucky River Community Care*,

supra at 713, the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." Following the admonitions of the Supreme Court, the Board in *Oakwood Healthcare, Inc.*, supra, adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare, Inc.*, supra, slip op. at 7. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id.* slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted). However, "...the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

*Oakwood Healthcare, Inc.*, supra, slip op. at 9.

The Board also has held the authority effectively to recommend “generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed.” *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982).

Based upon my review of the evidence, and for the reasons set forth below, I conclude the LPNs are Section 2(11) supervisors who have the authority to effectively recommend discipline and the rewarding of employees, using independent judgment.<sup>6</sup> Since I find the Employer has met its burden concerning these two supervisory indicia, I need not address the arguments that the LPNs also possess other supervisory authority, such as the authority to assign or responsibly direct.

*A. Effectively Recommend Discipline*

According to its Employee Handbook, the Employer’s “philosophy regarding discipline” is to attempt to give each employee the opportunity to change inappropriate behavior prior to terminating employment:

Depending on the circumstances, generally a supervisor or department manager will provide you with warnings and guidance as to what changes in job performance or behavior are necessary to avoid termination. Employment may be terminated if the employee fails to make appropriate changes in job performance or behavior, or if inappropriate job performance or behavior continues.

The Employer’s progressive disciplinary procedure is as follows: (1) verbal or initial warning, (2) written warning, (3) final warning, (4) suspension, and (5) termination.<sup>7</sup> The

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<sup>6</sup> The parties stipulated the LPNs all possess the same authority.

<sup>7</sup> The Work Rules are broken down into three categories. Category I contains a list of “less serious” violations that should be treated with progressive discipline, unless the violations are recurring or considered serious enough under the circumstances to warrant advanced disciplinary action. Category I includes 26 examples, such as failing to: maintain acceptable standards of respect for residents, visitors, and co-workers; follow departmental procedures; perform position responsibilities in a timely and appropriate manner; carry out general or specific instructions; follow proper procedures regarding time clock; readily cooperate with fellow employees and/or supervisors; comply with dress code; be and remain at work station during shift; attend mandatory training; comply with health, safety, security and fire policies and procedures; etc. Category II violations are “of a serious nature” and may result in a final warning for the first violation even though a verbal warning or written warning has not been issued. Category II

Employee Handbook states that, “[w]here an employee’s conduct merits corrective action, the immediate supervisor will determine the appropriate level of discipline in each case and will acknowledge mitigating circumstances where they apply.”<sup>8</sup>

The Employer asserts the RNs and the LPNs oversee the CNAs and CMAs in performing their duties and have the authority to effectively recommend discipline in the event a CNA or CMA violates a work rule. The Employer introduced numerous Disciplinary Action Records LPNs have completed over the last few years. The Disciplinary Action Record is a one-page form with sections for the employee’s name, the employee’s title, the name of the supervisor completing the form, the date, the category of rule that was violated, and the recommended action (verbal warning, written warning, final written warning, final written warning and suspension, or termination). There also is a section for the individual completing the form to provide an account of the actions leading to the discipline, and a section for the employee subject to the discipline to provide a statement. The LPN then typically signs the form as the “Supervisor.”

Employer’s Exhibit 14 contains Disciplinary Action Records that LPNs completed from 2004 to 2008. Exhibit 14 includes situations in which an LPN issued verbal warnings to CNAs for taking unscheduled breaks, failing to properly wake and dress residents for scheduled activities, leaving before shift ended, failing to toilet and/or shower a resident, failing to properly

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includes 15 examples, such as: engaging in negligent or careless behavior resulting in danger, damage, or loss of property; making false or malicious statements about a resident, resident family member, co-worker, or visitor; threatening, coercing, intimidating or interfering with other employees; misusing Company, resident or co-worker property; failing to report abuse or neglect; failing to report work-related injuries; etc. Category III contains a list of “very serious” violations that may subject the employee to immediate suspension, without pay, pending investigation and, if verified, may lead to termination. Category III includes 20 examples, such as: abusing a resident, visitor, or another employee, or neglecting patient care duties related to the safety, health and/or physical comfort of the resident; insubordination; falsifying company records; selling, using or distributing controlled substances (except as prescribed by a physician); sleeping while on duty; stealing or attempt to steal property of another; destroying property; abandoning the job; possessing or using firearm or other dangerous weapon; etc.

<sup>8</sup> There is no dispute that only the Facility Administrator has the authority to terminate an employee.

transfer resident, etc. Exhibit 14 also includes situations in which LPNs issued written warnings for failing to follow safety procedures for resident care, using an unsanitary method of bathing a resident, sleeping while on duty, failing to maintain acceptable level of respect for resident, failing to follow safety procedures, leaving residents unattended, etc. Also, Exhibit 14 includes situations in which LPNs issued final warnings and/or suspensions for sleeping while on duty and falsifying patient information.

The LPNs do not have access to employee personnel files and may not be aware that under the Employer's progressive disciplinary procedure the employee should be receiving a higher level of discipline for a particular infraction. In those instances, the discipline the LPN issued to the employee will be changed by the Director of Nursing or the Human Resource Manager to reflect the progressive discipline. For example, Employer Exhibit 14 contains a Disciplinary Action Record in which an LPN gave a CNA a verbal warning for transferring a resident using a mechanical lift without a second person present, in violation of the Employer's work rules. The discipline was later changed from a verbal warning to a final written warning and a suspension because the CNA previously had received a verbal and/or written warning for inappropriate conduct. There, however, was no independent review by the Director of Nursing or the Human Resource Manager of the events giving rise to the verbal warning the LPN issued to the CNA. Also, Employer's Exhibit 14 shows a situation in April 2006, when an LPN (Shelly Munds) gave a written warning to a CNA for sleeping while on duty, and about three or so weeks later, another LPN (Sharon Hodkiewicz) gave the same CNA a final warning for again sleeping while on duty.

The Board has held LPNs to be statutory supervisors when they have the authority to fill out employee counseling forms under the employer's progressive disciplinary policy, which may



not result in immediate discipline but which lays a foundation for future discipline against an employee. See *Oak Park Nursing Care Center, Inc.*, 351 NLRB No. 9, slip op. at 2 (2007); see also *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB No. 84 (2007). In *Oak Park Nursing Care Center*, the Board concluded because the licensed practical nurses had the discretion to write-up infractions on employee counseling forms, and those forms laid the foundation for future discipline, the LPNs were vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against the employees. See *id.*<sup>9</sup>

As stated above, the LPNs have the authority to issue CNAs verbal and written warnings for violation(s) of the Employer's work rules, and those warnings lay a foundation for future discipline under the Employer's progressive disciplinary procedure. As stated above, there are examples in the record of employees receiving progressive discipline after receiving verbal or written warnings from an LPN.<sup>10</sup> There also is evidence LPNs have effectively recommended that a CNA be suspended based on the work rule violated.

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<sup>9</sup> The Board has applied similar reasoning in the non-LPN context. For example, in *Progressive Transportation Services*, 340 NLRB 1044 (2003), the Board found that a deck lead supervisor possessed authority to effectively recommend discipline under Section 2(11) because she initiated the disciplinary process. The deck lead supervisor brought disciplinary issues to the attention of the director of housekeeping, who decided the level of discipline based on the supervisor's account and advised her about the preparation of the disciplinary notice. *Id.* at 1045-1046. The director typically followed the supervisor's recommendations without an independent investigation. *Id.* Similarly, in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474-1475 (2004), the Board found that individuals classified as assistant supervisors were supervisors under Section 2(11) because they were authorized to write recommendations for disciplinary action. Although those write-ups were reviewed by an upper manager, the manager had a policy of routinely "signing off" on recommendations if they were justifiable, without conducting an independent investigation. *Id.* at 1474. The Board found that if the assistant supervisor brought a disciplinary matter to the attention of management, discipline would ensue, demonstrating that the assistant supervisors' disciplinary recommendations were effective. *Id.* at 1475. The holdings in these cases apply in the present case. The forms completed by the LPNs initiate the disciplinary process, and the evidence establishes they are routinely followed, and are not independently reviewed by upper management in order to be effective.

<sup>10</sup> As for further evidence of independent judgment, the Employer's Employee Handbook states "[w]here an employee's conduct merits corrective action, the immediate supervisor will determine the appropriate level of discipline in each case and will acknowledge mitigating circumstances where they apply." In this case, the record establishes that the LPNs have the discretion to decide to counsel an employee rather than issue a Disciplinary Action Record, and at least one LPN, Helen Hinkfuss, has exercised that authority. Earlier this year, Hinkfuss

The Union contends the LPNs do not have the authority to effectively recommend discipline. First, the Union asserts there are examples in which the LPN made a decision to discipline only to later be reversed by the Director of Nursing or the Human Resource Manager. One such incident involved LPN Gloria Dunlavy, who verbally warned or reprimanded a CNA, because she left a resident in soiled clothing for several hours. Dunlavy testified that after she reprimanded the CNA, the CNA went to the Director of Nursing to complain about Dunlavy's treatment of her. The Director of Nursing later told Dunlavy that she was "too hard" on the CNA. The Director of Nursing testified she told Dunlavy to sit down with the CNA and discuss what had happened, but did not rescind the warning Dunlavy gave the CNA. Another situation the Union cites involves a three-day suspension an LPN (Theresa LaCanne) gave to a CNA for being insubordinate. The CNA complained to the then-Director of Nursing (Narri Shrap) about the discipline. LaCanne testified Shrap later told her she should not have issued the discipline. It is unclear from the record if the three-day suspension was rescinded, reduced, or was left unchanged after the CNA complained to Shrap about the discipline. However, it is clear from the record that under the Employer's progressive disciplinary procedure there is no three-day suspension. When there is a serious infraction, the Employer's practice is to suspend the employee pending an investigation into the alleged infraction.

Regardless, both of these situations establish the LPNs at issue had the authority to effectively recommend discipline, and they each exercised that authority. The fact the two aggrieved parties in these examples complained to a higher authority about the discipline, and

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elected to address issues she was having with a CNA through counseling, but kept records of this counseling in the event the issues were not resolved and discipline became necessary. The Director of Nursing confirmed that Hinkfuss, as well as the other LPNs, has the authority and discretion to decide whether to address performance issues through counseling or through the disciplinary process.

that higher authority likely had the power to change the discipline, does not undermine my conclusion that the LPNs had and have the authority to effectively recommend discipline, using their independent judgment. The question is not whether the disciplinary recommendation can be appealed, but rather whether the person issuing or recommending the discipline has the authority to make the recommendation. There is no evidence in this case that the employees who challenged the discipline they received from an LPN claimed that the LPN did not have the authority to recommend the discipline at issue, and absent the appeals to upper management, there is no evidence upper management would have independently reviewed the facts giving rise to the recommended discipline. See *Oak Park Nursing Care Center*, supra, slip op. at 4-5 (independent authority to effectively recommend initiation of progressive disciplinary procedure, using independent judgment, sufficient to confer supervisory status).

Second, the Union contends that all employees have the authority to discipline. The evidence, however, does not support this claim. The testimony on this point is somewhat vague, but it appears that everyone in the facility, pursuant to state and federal regulations, has the responsibility to report resident abuse, regardless of who is alleged to have abused the resident. As for “discipline” issued by the CMA, if there is a medication error, a report will be printed out. The medication error report, however, is not discipline. If an employee has a number of medication error reports, the employee may be issued discipline by the Director of Nursing.

Finally, several of the LPNs who testified provided examples in which they reported work rule violations to the Director of Nursing or a Registered Nurse and were told to issue discipline to the employee who violated the work rule. The evidence does not establish that the LPNs were told to report violations to someone before issuing discipline, and, of the examples given, it does not appear that a person of higher authority reviewed the events to verify that discipline was

warranted. In the examples given, the higher authority simply accepted the LPN's version of what happened, which supports a finding of supervisory status. See *Starwood Hotels & Resorts Worldwide, Inc.*, supra; see also *Progressive Transportation Services*, 340 NLRB 1044 (2003).

Based on the foregoing, I conclude that the LPNs are statutory supervisors based on their authority to effectively recommend discipline, using independent judgment.

*B. Performance Evaluations*

The Employer also contends that the LPNs are statutory supervisors because of their involvement in the annual evaluations of the CNAs.<sup>11</sup> According to the Director of Nursing, the performance appraisal process for the CNAs is initiated by the Human Resource Manager who on the CNA's anniversary date will forward a performance appraisal form, which is a 17-page document, to the Director of Nursing, who then assigns to either an RN or LPN the task of completing the form. In completing the performance appraisal form, the RN or LPN assigns a numerical rating (1 (needs improvement), 2 (meets expectation), or 3 (exceeds expectations)) for each of the 62 listed items covering seven categories (General Patient/Resident Care, Maintenance of Supplies/Equipment, Adherence to Facility Procedures, Documentation, and Human Relations) to arrive at a total score.<sup>12</sup> The form also has sections where the LPN can provide written comments addressing the CNA's "Strengths" and "Areas Requiring Further Development" and, if appropriate, establish a "Development Plan." There also is a section for

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<sup>11</sup> The Employer asserts the LPNs also are involved in evaluating new employees at the end of their probationary periods. There are three options when an employee reaches the end of his/her probationary period: (1) satisfactory completion of the probationary period, (2) extension of the probationary period, or (3) termination. Any decision to extend the probationary period or terminate the employee would be reviewed and must be approved by the Director of Nursing and, if termination is recommended, the Administrator. Additionally, there is no wage increase or other added benefit once an employee completes their probationary period. Based upon this evidence, I conclude the LPNs role in evaluating new employees at the end of their probationary period does not demonstrate possession of supervisory authority within the meaning of Section 2(11) of the Act. See *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 (1999).

<sup>12</sup> The LPNs are not trained or provided any guidelines for how to complete these performance appraisal forms.

the employee to comment on his/her evaluation. The CNA's total rating score given by the LPN is divided by the total possible score and converted into a percentage. The Employer's Human Resource Manager then is guided by this percentage when determining the CNA's wage increase (if any) for the upcoming year.

The Board has found LPNs to be Section 2(11) supervisors when they independently perform evaluations of other employees and those evaluations lead directly to personnel actions affecting those employees, such as merit increases. See *Extendicare Health Facilities, Inc.*, 330 NLRB 1377 (2000); *Cape Cod Nursing and Retirement Home*, 329 NLRB 233 (1999); *Bayou Manor Health Center*, 311 NLRB 955 (1993). In *Bayou Manor*, which is the seminal case on this issue, the Board found the employer's licensed practical nurses were statutory supervisors solely because the evaluations they completed, using a numerical scoring system similar to the one used in the present case, affected the salaries of the employer's nursing aides, as there was a direct correlation between the evaluations and merit increases or bonuses awarded. In cases since *Bayou Manor*, such as *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995), the Board has held the same holds true even if the purported supervisor collaborates with a superior and plays a significant role in completing the evaluation that results in the wage increase.

In the present case, the Director of Nursing, Julie Sweet, testified the wage increase is based upon the CNA's performance rating, and neither she nor the Human Resource Manager change the ratings given by the LPN. At the hearing, Sweet testified as follows concerning the evaluations:

HEARING OFFICER O'NEIL: .... How does the percentage correlate to their rate of annual increases? How does that work?

THE WITNESS: There is -- I don't want to say "list" but there is, you know, based on the percentage it equivalates (sic) to a percentage of an increase.

HEARING OFFICER O'NEIL: In wage scale?

THE WITNESS: In wage scale. And I don't have anything to do with that. That is why I'm just not quite sure.

HEARING OFFICER O'NEIL: Okay.

THE WITNESS: Because it goes back to HR then, human resources, and she is the one who just calculates it based on the percentage.

HEARING OFFICER O'NEIL: Okay. Would it be fair to characterize it then -- you have sort of a merit pay system then based on what kind of percentage the CNA is evaluated at?

THE WITNESS: Yes.

HEARING OFFICER O'NEIL: Okay. As far as her future raise?

THE WITNESS: Yes.

HEARING OFFICER O'NEIL: Okay.

...

Q Do you make any changes or adjustments to the mathematical calculations or to the evaluation form as completed by the RN or the LPN?

A No, I do not.

...

Q So as I understand this process they take page 9. That percentage goes to the human resources department and there is an automatic merit pay adjustment?

A Correct.

...

HEARING OFFICER O'NEIL: Okay. Does -- once HR does the mathematical calculation and figures out the wage increase does it ever come back to you for approval, or is it just automatic?

THE WITNESS: It never comes back to me.

...

HEARING OFFICER O'NEIL: Okay. Do you know -- and this is only if you know. Do you know if Sandy in HR has any discretion as far as changing wage amounts or does HR just go by the percentage in figuring out the raise?

THE WITNESS: They just go by the percentage.<sup>13</sup>

The Union contends the Employer has not met its burden because it has failed to establish the necessary link between the annual performance ratings and the resulting wage increases.

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<sup>13</sup> Sweet acknowledged she was not familiar with how precisely the Human Resource Manager performs the calculation for determining the wage increase. However, the performance appraisal forms completed by LPNs for the last four years, which were introduced into the record, establish a connection between the ratings on the performance appraisal forms given by the LPN and the merit increase subsequently awarded.

Although the record does not describe the precise formula the Human Resource Manager uses in calculating the wage increases, or if other factors are considered, a review of several of the completed performance appraisal forms show there is a consistent correlation between the ratings given by the LPN and the resulting wage increase awarded to the employee. As such, I conclude that because the evaluations completed by the LPNs--which are not independently reviewed or changed by upper management--have a significant role in determining how much of a wage increase the CNAs or CMAs receive, the LPNs have the authority to effectively recommend rewarding employees with a wage increase.<sup>14</sup>

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<sup>14</sup> The Board has held it is not material to the determination of supervisory status that the LPN is not aware of the specific wage increase each employee is eligible for as a result of the rating given. See *Hillhaven Kona Healthcare CTR.*, 323 NLRB 202 (1997).

#### **IV. CONCLUSION**

Based on the foregoing, I conclude the Employer has met its burden of proof and established that the LPNs are statutory supervisors who have the authority to effectively recommend discipline and to effectively recommend rewarding employees, using their independent judgment. As such, the LPNs are properly excluded from the unit.

Therefore, I am directing an election in the following unit: All full-time and regular part-time certified nursing assistants, housekeeping employees, laundry workers, recreation assistants, certified medication aides, dietary aides, and chef/cooks working at the Employer's 1625 East Main Street facility in Clintonville, Wisconsin; excluding subcontracted employees, professional employees, managerial employees, confidential employees, office clerical employees, casual employees, guards and supervisors as defined in the Act.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are



employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203 on or before June 18, 2008.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by June 25, 2008.**

### **OTHER ELECTRONIC FILINGS**

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing CNA also be found on the National Labor Relations Board web site at [www.nlr.gov](http://www.nlr.gov). On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Milwaukee, Wisconsin on June 11, 2008.

/s/Irving E. Gottschalk

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Irving E. Gottschalk, Regional Director  
National Labor Relations Board  
Thirtieth Region  
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Milwaukee, Wisconsin 53203